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United Nations Commission on International Trade Law

Forty-third session

Summary record of the 906th meeting

Held at Headquarters, New York, on Wednesday, 23 June 2010, at 3 p.m.

Temporary Chairperson: Mr. Sorieul (Secretary of the Commission)

Chairperson: Mr. Schneider (Chairperson of the Committee of the Whole) (Switzerland)

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The meeting was called to order at 3.15 p.m.

Election of officers (*continued*)

1. **The Temporary Chairperson** invited the Group of African States to submit a nomination for the office of Vice-Chairperson of the Commission.

2. **Ms. Kiragu** (Kenya), speaking on behalf of the Group of African States, nominated Mr. Moollan (Mauritius) for the office of Vice-Chairperson of the Commission.

3. *Mr. Moollan (Mauritius) was elected Vice-Chairperson by acclamation.*

4. *Mr. Schneider (Switzerland), Chairperson of the Committee of the Whole, took the Chair.*

Finalization and adoption of a revised version of the UNCITRAL Arbitration Rules (*continued*)
(A/CN.9/703 and Add.1; A/CN.9/704 and Add.1-10)

Draft revised UNCITRAL Arbitration Rules

Section III. Arbitral proceedings (continued)

Draft article 26. Interim measures (continued)

5. **The Chairperson** invited further comments on the draft article, noting that that discussion of paragraph 2 (c) had been suspended and that the question of the effect on draft article 17 of the deletion of paragraph 9 remained open. The delegation of Greece had proposed a drafting change to the last part of the chapeau of the draft article, which would read: "... the arbitral tribunal orders a party to take without limitation any of the following measures:".

6. **Mr. Loken** (United States of America) proposed that the word "temporary" should be transferred to the last clause of the chapeau, which would then read: "... the arbitral tribunal orders a party to take temporary action, including, without limitation, any of the following:".

7. **Mr. Bellenger** (France) said that the present wording of the French text of the chapeau was satisfactory, the main point being that the list was not an exhaustive one.

8. *Draft article 26, as amended, was adopted, subject to finalization of the drafting of the chapeau and further consideration of paragraph 2 (c).*

Draft article 27. Evidence

9. **Mr. Rovine** (Observer for the Association of the Bar of the City of New York) said that, guided by practice, he thought that it would be useful for the draft article to provide for an explicit right to cross-examine witnesses.

10. **The Chairperson** said that, in the present wording, there were no restrictions on the questioning of witnesses, except as stipulated in draft article 28.

11. *Draft article 27 was adopted.*

Draft article 28. Hearings

12. **Ms. Aguirre** (Argentina) proposed the addition at the end of paragraph 4 of the following words: "..., provided that this is duly justified by some circumstance".

13. **Ms. Matias** (Israel), supported by **Mr. Viswanathan** (India), said that, in view of the increasingly frequent use of videoconferencing, it would be preferable not to require particular justification for such use.

14. **Mr. Chung** Chang-ho (Republic of Korea) concurred, noting the applicability of draft article 17, paragraph 1.

15. **Mr. Rovine** (Observer for the Association of the Bar of the City of New York) also concurred. He wondered whether it might be useful to replace the word "examined" in paragraph 4 by "heard".

16. **The Chairperson** took it that, in the absence of support for either of the proposed amendments, the draft article could be adopted.

17. *Draft article 28 was adopted.*

Draft article 29. Experts appointed by the arbitral tribunal

18. *Draft article 29 was adopted.*

Draft article 30. Default

19. **Mr. Sewaha** (Egypt) said that, in the Arabic version of the draft article, the words "without showing sufficient cause" contained in the chapeau of the English text, had been transposed to subparagraphs (a) and (b). He wondered whether there was not a contradiction between subparagraph (b) of the draft article and draft article 32.

20. **The Chairperson** said that subparagraph (b) concerned the substance or merits of a case, whereas draft article 32 was a procedural provision regulating non-compliance with the Rules. There was no contradiction between them.

21. *Draft article 30 was adopted.*

Draft article 31. Closure of hearings

22. **The Chairperson** noted that "witnesses" would normally be included in "further proofs" and not seen as a separate category, as in paragraph 1.

23. **Ms. Smyth** (Australia) proposed that paragraph 1 be reworded to read: "... further proofs to offer, including witnesses to be heard ...".

24. **Mr. Moollan** (Mauritius) said that the wording was the same as in the 1976 text and had not created any problem.

25. *Draft article 31 was adopted.*

Draft article 32. Waiver of right to object

26. *Draft article 32 was adopted.*

Section IV. The award

Draft article 33. Decisions

27. **Mr. Friedman** (Observer for the International Bar Association) said it was regrettable that, according to the present draft wording, a presiding arbitrator alone could decide only on questions of procedure and would not be able to make an award. The Rules of Arbitration of the International Chamber of Commerce provided for such a possibility in the absence of a majority. He proposed the addition of a third paragraph to that effect.

28. **Mr. Torterola** (Argentina) said that his delegation wished to retain the wording developed by the Working Group.

29. **Mr. Schöll** (Observer for Switzerland), supported by **Mr. Möller** (Observer for Finland), said that he supported the proposal of the International Bar Association but would accept whatever consensus emerged regarding the wording of draft article 33.

30. **Mr. Moollan** (Mauritius) said that the proposal of the International Bar Association had merit because, as presently worded, the Arbitration Rules left open the possibility of an arbitration that ended in deadlock.

31. **Mr. Castello** (United States of America) said that his delegation favoured leaving the current wording of the draft article unchanged. It had been adopted by many parties because it offered them the security that any decision taken by an arbitral tribunal would have the backing of at least two of its members. Those who supported giving a presiding arbitrator a deciding vote in the case of deadlock were making the assumption that the presiding arbitrator was the most reasonable member the tribunal. That assumption was not necessarily true.

32. **The Chairperson** suggested that, in view of the opinions expressed, the Committee should retain the wording agreed upon by the Working Group.

33. **Mr. Seweha** (Egypt) said that, with regard to the decisions on questions of procedure referred to in draft article 33, paragraph 2, he wondered whether the presiding arbitrator would also participate in the review of a decision that he or she had made alone, given that the last words of paragraph 2 referred to the entire arbitral tribunal. On the one hand, it was not appropriate for the presiding arbitrator to review his or her own decision. On the other hand, the review could not take place without the presiding arbitrator because the arbitral tribunal would otherwise be improperly constituted. If, as his delegation believed, the participation of the presiding arbitrator in a review of a decision that he had made alone would be contrary to the Rules, the last clause of the paragraph 2 should be delete

34. **The Chairperson** said it was his understanding that, with regard to questions of procedure that had been decided by the presiding arbitrator alone, the entire arbitral tribunal or any combination of two arbitrators could review the presiding arbitrator's decision.

35. *Draft article 33 was adopted.*

Draft article 34. Form and effect of the award

36. **Ms. Montejo** (Office of Legal Affairs) said that the Commission should make clear in its report that a party's legal duty to publicly disclose an award, referred to in draft article 34, paragraph 5, must not be interpreted as limiting the ability of the United Nations to impose certain restrictions on the disclosure of information in connection with its privileges and immunities, including in respect of arbitral awards.

Draft article 35. Applicable law, amiable compositeur

37. **Mr. Friedman** (Observer for the International Bar Association) said that, with regard draft article 35, paragraph 1, concerning the designation of the law applicable to the substance of the dispute, he saw no reason to restrict the scope of choice of an arbitral tribunal to determining which specific national law was to be used in situations where the parties had failed to decide that question. He therefore proposed that the last clause of paragraph 1 should be amended to read: "... the arbitral tribunal shall apply the rules of law which it determines to be appropriate". Doing so would dispel any doubt as to whether an arbitral tribunal had the authority to resolve a dispute by applying a set of rules other than a national law, including, for example, the rules of the International Institute for the Unification of Private Law (UNIDROIT).

38. **Mr. Jacquet** (France) said that the proposed amendment would not prevent a tribunal from applying national law; it would simply open the possibility of applying rules other than national laws.

39. **Mr. Moollan** (Mauritius) recalled that the Working Group, after lengthy and considered debate, had decided that an arbitral tribunal should be restricted to choosing a national law. It was therefore not necessary for the Committee to address the question once again.

40. **Ms. Cordero Moss** (Norway) said that draft article 35 gave both the parties to the dispute and the arbitral tribunal considerable flexibility with regard to designating which laws or rules were applicable to the dispute. However, the Commission's report should reflect that neither the parties nor the arbitral tribunal were completely free to decide which law or rules were applicable because disregard of certain laws could lead to the invalidity or unenforceability of the arbitral award. That was made clear under articles 34 and 36 of the Model Law on International Commercial Arbitration, as well as article V of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

41. **Mr. Petrochilos** (Greece) said that, while he agreed with the representative of Norway, the report should go even further and specify that draft article 35, paragraph 1, did not constitute a complete guide with regard to which laws or rules applied in an arbitration. There were matters of applicable law that were not dependent on the parties' choice, including the parties' capacity to enter into a transaction.

42. *Draft article 35 was adopted.*

Draft article 36. Settlement or other grounds for termination

43. *Draft article 36 was adopted.*

Draft article 37. Interpretation of the award

44. *Draft article 37 was adopted.*

Draft article 38. Correction of the award

45. *Draft article 38 was adopted.*

Draft article 39. Additional award

46. *Draft article 39 was adopted.*

Draft article 40. Definition of costs

47. *Draft article 40 was adopted.*

Draft article 42. Allocation of costs

48. **Mr. Chung** Chang-ho (Republic of Korea) said that there was a discrepancy between the wording of draft article 42, paragraph 2, and the wording of draft article 40, paragraph 1. Specifically, the former spoke of an "award" while the latter spoke of a "decision". His delegation therefore proposed that draft article 42, paragraph 2, should be amended to conform with draft article 40, paragraph 1.

49. **The Chairperson** said that draft article 40, paragraph 1, made reference to a decision because a correction was not necessarily an award but rather a decision. On the other hand, draft article 42, paragraph 2, specifically concerned awards. It was his understanding that the reference in the latter must be to an award because of enforcement requirements. If, however, the decision concerned a sum that one party must pay to another, then "award" would be the appropriate word. He suggested that the Committee might wish to postpone consideration of draft article 42 until a later time.

50. *It was so decided.*

51. **Mr. Castello** (United States of America) said that, in his observations regarding draft article 40, paragraph 2 (f) (A/CN.9/704), the Observer of the

Permanent Court of Arbitration (PCA) had noted that, although the definition of costs included both "the fees and expenses" of the appointing authority, that same definition only included the "expenses" of the Secretary-General of PCA. He had further noted that PCA currently used the term "administrative fee" for the amount charged to cover administrative and other expenses involved in processing an application for designation of an appointing authority. In order to remove the potential ambiguity arising from the difference in wording, the Secretary-General of PCA had therefore proposed that draft article 40, paragraph 2 (f), should be amended as follows: "Any fees and expenses of the appointing authority and of the Secretary-General of the PCA".

52. **The Chairperson** said that he took it that the Committee wished to adopt the proposed amendment to draft article 40, paragraph 2 (f).

53. *It was so decided.*

Draft article 43. Deposit of costs

54. *Draft article 43 was adopted.*

The meeting was suspended at 4.30 p.m. and resumed at 5.10 p.m.

Annex to the Rules

Draft model arbitration clause for contracts

55. **The Chairperson** invited the Committee to express any further views on the placement and layout of the draft model arbitration clause for contracts. He recalled that, as the Committee was still considering a possible waiver statement in connection with draft article 34, additional changes to the wording of the draft model arbitration clause might be required.

56. *The draft model arbitration clause for contracts was adopted, subject to any amendments made necessary by the Committee's decisions regarding draft article 34.*

Draft model statements of independence pursuant to article 11 of the Rules

57. **Mr. Petrochilos** (Greece), referring to the draft model statements of independence, said that the word "hereby" should be deleted from the first and second paragraphs, having been made redundant by an earlier deletion. Referring to the note below the draft model statements, he proposed that the word "parties" should be replaced by the words "prospective arbitrators", as the model statements were intended to be used by arbitrators if they so wished. Alternatively, the introductory sentence could be made impersonal, and mention neither the parties nor the arbitrators.

58. **Mr. Loken** (United States of America) said that his delegation had understood the model statements to be texts that the parties could propose to the arbitrators, who could elect to sign them or not.

59. **The Chairperson** said that the draft model statements raised two questions. The first concerned implementation. While arbitral institutions would usually call on arbitrators to make a statement of impartiality upon appointment, it was unclear what the course of action would be when a similar request was being made by the parties. The second concerned obligation. Draft article 11 of the Rules specified, in connection with arbitrators, that "he or she shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence", suggesting that some form of obligation existed. The same draft article then referred the reader to the model statements in the present annex.

60. Concluding that the two paragraphs containing the draft model statements were addressed to arbitrators, but that the accompanying note was addressed to the parties, he suggested that the introductory sentence to the note could read "The parties may consider requesting from the arbitrator the following addition to the statement of independence".

61. **Mr. Moollan** (Mauritius) said that he concurred with the view of the United States representative, and advocated a minor change to the wording suggested by the Chairperson, to read "The parties may consider requesting the following statement from the arbitrator in addition to the statement of independence", in order to clarify the status of the text attached to the note.

62. **Mr. Ghikas** (Canada) said that he wondered whether Working Group II had intended that a request to an arbitrator to provide the additional statement in the note could be made by only one party, or whether the request must be made by all the parties.

63. **Mr. Mourre** (Observer for the International Bar Association) said that he wondered whether the paragraph under discussion could be included in the draft statement itself rather than in the note. Doing so would make it clear to arbitration practitioners that

availability, the matter dealt with in the note, was a prerequisite in UNCITRAL arbitration. A consolidated International Chamber of Commerce statement of acceptance, availability and independence had been in use successfully for some time.

64. **The Chairperson** said that the separation of the statement of independence from the statement of availability was explained by the reference in draft article 11 of the Rules to a statement of independence. The Rules did not mention the need for a statement of availability.

65. **Mr. Petrochilos** (Greece) said that, having read the reports of Working Group II and draft article 11 of the Rules, he remained unconvinced that the draft statements of independence should be available only to the parties to propose, as opposed to being available also to arbitrators to use if they wished. The Committee's report should clarify that matter.

66. **Mr. Torterola** (Argentina) proposed the addition to the draft statements of wording confirming that the arbitrator making the statement was impartial and independent not only of the parties, but also of the parties' lawyers.

67. **Mr. Boulet** (Observer for Belgium) said that he supported the proposal.

68. **Mr. Moollan** (Mauritius) said that, as the aspect of arbitration that the Committee was considering was developing rapidly, he would caution against moving faster than current practice. The Committee should in particular examine the wording of the International Chamber of Commerce statement of acceptance, availability and independence to see whether it referred to the parties' lawyers.

69. **The Chairperson** said that, in his view, the Committee must determine not just what was accepted practice, but also what its own wishes were. He wondered whether draft article 5 of the Rules, on representation and assistance, was relevant in that regard.

70. **Mr. Möller** (Observer for Finland) said that he supported the view of the representative of Mauritius. Adding a reference to the parties' lawyers could prove to be too broad. He assumed that references to the "parties to the arbitration" automatically included counsel representing them in the arbitration. Unbeknownst to the arbitrators, the parties might also have used the services of a wide range of other lawyers.

71. **Mr. Raouf** (Observer for the Cairo Regional Centre for International Commercial Arbitration) said that the Centre made no reference to the parties' lawyers in its own arbitration practice. However, the International Chamber of Commerce statement of acceptance, availability and independence referred to disclosing relationships between an arbitrator and "any of the parties, their related entities or their lawyers or other representatives".

72. **Mr. Torterola** (Argentina) said that the Committee should take account of the need for transparency in arbitration, particularly given the direction that the International Chamber of Commerce was taking. He urged that the Committee should not restrict transparency and lead users to question the impartiality of decision-making.

73. **The Chairperson**, noting that the practice of institutions was in any event inconsistent, said that the Committee should be careful to draw a distinction between the rules and practices of institutions and the rules and practices of UNCITRAL. While institutions could rapidly change their practices and model statements in response to problems that arose, the Commission could not react with the same speed and therefore had traditionally been more cautious, particularly in rapidly evolving situations.

74. **Mr. Moollan** (Mauritius), emphasizing that his earlier statement had not been intended to restrict the Committee's margin for discretion, said that the statement of independence used by the London Court of International Arbitration (LCIA) indicated simply "I am impartial, and independent of each of the parties", with no reference to the parties' lawyers.

75. **Ms. Matias** (Israel) said that the first of the draft model statements in the annex to the Rules, by indicating "To the best of my knowledge, there are no circumstances, past or present, likely to give rise to justifiable doubts as to my impartiality or independence", would perhaps provide sufficient safeguards, even if it did not specifically mention the lawyers or counsel of the parties.

76. **Ms. Perales Viscasillas** (Spain) said that her delegation, like others, took references to the parties in the current context to include their representatives and lawyers. However, if more clarity was deemed

necessary, perhaps the first draft model statement could be rephrased to read: "I am impartial and independent of the parties and their representatives in this dispute, and intend to remain so".

77. **Mr. Ghikas** (Canada) said that it was important to remember that the aim of the draft model statements was to give effect to article 11 of the Rules. They should be read in conjunction with it and had no need to indicate more than was required, namely the disclosure of anything that might give rise to justifiable doubts regarding the arbitrator's impartiality or independence. If it was thought necessary to provide more detail, that detail should logically be placed in draft article 11 of the Rules as well as, or instead of, in the annex to the Rules. However, a simpler solution was to delete the first sentence of each of the draft model statements.

78. **The Chairperson** said that draft article 11 referred to "impartiality and independence", as did the first sentence of each of the draft model statements. Deleting those sentences would eliminate that parallel wording. Perhaps the first sentence in each case could be shortened to "I am impartial and independent and intend to remain so".

79. **Mr. Loken** (United States of America), supported by **Mr. Moollan** (Mauritius), said that the shortened formulation was awkward because it did not specify vis-à-vis whom the arbitrator must be impartial and independent.

80. **Mr. Torterola** (Argentina) said that, in his delegation's view, the current approach was neglecting a valuable opportunity to increase transparency in the arbitration process. However, he would not oppose the consensus of the Committee.

81. **Ms. Cordero Moss** (Norway) said that, in her view, adding detail to existing provisions tended to create problems rather than solving them. Independence and impartiality were important even in situations in which arbitrators had no link with the parties. They might, for example, have a personal economic interest in the outcome of the dispute. Perhaps the formulation "impartial and independent in the context of the dispute" could be used.

82. **The Chairperson** said that he deduced from the discussion that the Committee's primary concern was to have arbitrators furnish a statement of impartiality and independence from an arbitrator, and to make clear that the impartiality and independence was vis-à-vis the parties. That was covered by the first sentence of each of the model statements. By contrast, links with the parties' counsel, lawyers, witnesses or experts were considered of secondary importance, and they could be covered by the broad formulation of the second sentence of each of the statements.

83. **Mr. Moollan** (Mauritius) said that he agreed with the Chairperson's assessment of the priorities surrounding the issue. Arbitral institutions using statements of independence which mentioned independence from the parties to the dispute but went into no further detail did not appear to have problems.

84. **The Chairperson** said that he took it that the Committee saw no need to amend the wording of the draft model statements of independence pursuant to article 11 of the Rules.

85. *It was so decided.*

The meeting rose at 6 p.m.